

STATE OF SOUTH CAROLINA)	BEFORE THE CHIEF PROCUREMENT OFFICER
COUNTY OF RICHLAND)	
)	DECISION
In the Matter of Protest of:)	
)	CASE No. 2009-115
)	
Armstrong Flag Company)	
)	
)	
Materials Management Office)	POSTING DATE:
IFB No. 5400000800)	
<u>Statewide Term Contract for New Flags</u>)	September 1, 2009

This matter is before the Chief Procurement Officer (CPO) pursuant to a letter of protest from Armstrong Flag Company (Armstrong). With this invitation for bids (IFB), the Materials Management Office (MMO) attempts to procure two statewide term contracts for various flags. In the letter, Armstrong protested MMO's award to Allied Materials and Equipment Company, Inc. (Allied) alleging that the bid from Allied was "higher than the price submitted by Armstrong."

As the legal issues to be decided are clear, this decision is prepared without the benefit of a hearing.

NATURE OF PROTEST

The letter of protest is attached and incorporated herein by reference.

FINDINGS OF FACT

The following dates are relevant to the protest:

Solicitation Issued	02/20/2009
Bids Received	03/10/2009
Intent to Award Issued	03/26/2009
Protest by Armstrong	03/30/2009

BACKGROUND

This solicitation was issued by MMO as an Invitation for Bids under §11-35-1520 of the Code, to acquire two statewide term contracts [IFB p. 20, Award to Two Offerors]. The IFB included brand name or equal specifications listing “Annin Manufacturing Companies Products” [IFB, p. 13, Approved Products] and authorizing the bid of products equal to the Annin products. (IFB at page 13) The IFB required bidders offering products other than Annin to include the manufacturer’s latest literature [IFB, p. 13, Specifications not to be considered restrictive] showing complete product specifications and reading “Free samples are required for testing and/or evaluation of each type of Flag Fabric (Cotton, Nylon, Rayon & 2 Ply Spun Polyester). [IFB, p. 11, Samples] Armstrong’s bid did not include those required submittals. Armstrong’s bid was declared non responsive for three reasons documented in a Memo To Record entitled Procurement Manager’s Decision (See attached) prepared by the procurement manager, Richard Brinkley, reading specifically:

Armstrong’s offer could not be fairly evaluated with responsive offers for it failed to meet the following material requirements:

1. Samples were not provided as required;
2. Product literature was not provided as required, and;
3. Their offer did not identify the makes and models of the flags being offered.

The combination of all 3 above results in an undefined offer that simply cannot be evaluated.

The required samples and product literature were to be used by the State to identify what products were being offered and determine their level of quality.

While Armstrong's pricing has been established for each line item, the actual product is unknown. Therefore, there is the potential for Armstrong to shop or negotiate with suppliers after bids opened.

DISCUSSION

In its bid, Armstrong failed to include samples and product literature describing the flags it actually offered the State.

Budget and Control Board Regulation 19-445.2140 requires specifications clearly describe the State's requirements without being restrictive in nature.

19-445.2140.B. ... All specifications shall be written in a non restrictive manner as to describe the requirements to be met.

This IFB relied on brand-name or equal specifications as authorized:

19-445.2140(2) "Brand Name or Equal Specification" means a specification which uses one or more manufacturer's names or catalogue numbers to describe the standard of quality, performance, and other characteristics needed to meet state requirements, and which provides for the submission of equivalent products.

In Re: Protest by General Sales Company, Case No. 1983-5, the Procurement Review Panel noted with regard to brand name or equal specifications:

"Brand-Name or Equal" Specifications should set out all known acceptable brand name products... Where a purchase description is used, bidders must be given the opportunity to offer products other than those specifically referenced if those other products will meet the needs of the State in essentially the same manner as those referenced. It should always be clear that a "Brand-Name or Equal" description is intended to be descriptive not restrictive and is merely to indicate the quality and characteristics of the product that will be satisfactory and acceptable. Products offered as equal must, of course, meet fully the salient characteristics and product requirements listed in the Invitation for Bids.

MMO utilized Annin product numbers and descriptions to establish the basis for brand name or equal specifications for this solicitation, but clearly allowed for the submission of bids of other manufacturer's flags provided that the bidder submit samples and product literature the State could use

to compare the alternate flags. This brand name or equal solicitation required the submission of samples and specification sheets from bidders offering products other than Annin [IFB, p. 13] in order to determine their equivalency to the Annin products and consequently their responsiveness to the bid. Armstrong failed to submit the required samples and specification sheets and consequently MMO was unable to determine, based on the information submitted, whether the products bid were responsive to the IFB.

In this case, the samples and specification sheets were essential in determining the responsiveness of Armstrong's bid and not merely a matter of form or some immaterial variation from the exact requirements of the IFB. [§11-35-1520(13)] Consequently, the failure to submit the samples and specification sheets could not be waived or cured. On its face, Armstrong's bid was not responsive.

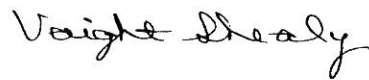
The Panel has ruled repeatedly that State procurement officials cannot clarify a nonresponsive bid. In Case No. 1996-2, In re: Protest of Two State Construction Company, the Panel held that "[t]he procuring agency may not seek clarification before making a determination of responsiveness, but must find a bid nonresponsive if it feels clarification of the bid is needed." In Case No. 1988-5, In re: Protest of CNC Company, the Panel held that General Services...could not contact CNC after the bids were opened for clarification. To do so would have been patently unfair to the other bidders....The Panel finds that MMO could not contact Ross to clarify the 90 day termination language and that the bid was therefore non-responsive on this issue."

In Re: Protest of Abbott Laboratories, Case No. 1997-4. *See, also*, R. 19-445.2080 (clarifications can't be used in an IFB unless the bidder "has submitted a bid or offer which obviously conforms in all material aspects to the solicitation," i.e., they're responsive).

DETERMINATION

Armstrong failed to comply with an essential requirement of the solicitation: the submission of samples and descriptive literature adequate to allow MMO to determine whether or not Armstrong's flags were equal. Armstrong's bid was materially non-responsive and cannot be awarded this contract.

Protest Denied.



R. Voight Shealy
Chief Procurement Officer
for Supplies and Services

September 1, 2009

Date

Columbia, S.C.

STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW

The South Carolina Procurement Code, in Section 11-35-4210, subsection 6, states:

(6) Finality of Decision. A decision pursuant to subsection (4) is final and conclusive, unless fraudulent or unless a person adversely affected by the decision requests a further administrative review by the Procurement Review Panel pursuant to Section 11-35-4410(1) within ten days of posting of the decision in accordance with subsection (5). The request for review must be directed to the appropriate chief procurement officer, who shall forward the request to the panel or to the Procurement Review Panel, and must be in writing, setting forth the reasons for disagreement with the decision of the appropriate chief procurement officer. The person also may request a hearing before the Procurement Review Panel. The appropriate chief procurement officer and an affected governmental body shall have the opportunity to participate fully in a later review or appeal, administrative or judicial.

Copies of the Panel's decisions and other additional information regarding the protest process is available on the internet at the following web site: www.procurementlaw.sc.gov

FILE BY CLOSE OF BUSINESS: Appeals must be filed by 5:00 PM, the close of business. *Protest of Palmetto Unilect, LLC*, Case No. 2004-6 (dismissing as untimely an appeal emailed prior to 5:00 PM but not received until after 5:00 PM); *Appeal of Pee Dee Regional Transportation Services, et al.*, Case No. 2007-1 (dismissing as untimely an appeal faxed to the CPO at 6:59 PM).

FILING FEE: Pursuant to Proviso 83.1 of the 2009-2010 General Appropriations Act, "[r]equests for administrative review before the South Carolina Procurement Review Panel shall be accompanied by a filing fee of two hundred and fifty dollars (\$250.00), payable to the SC Procurement Review Panel. The panel is authorized to charge the party requesting an administrative review under the South Carolina Code Sections 11-35-4210(6), 11-35-4220(5), 11-35-4230(6) and/or 11-35-4410(4). . . . Withdrawal of an appeal will result in the filing fee being forfeited to the panel. If a party desiring to file an appeal is unable to pay the filing fee because of hardship, the party shall submit a notarized affidavit to such effect. If after reviewing the affidavit the panel determines that such hardship exists, the filing fee shall be waived." 2008 S.C. Act No. 23, Part IB, § 83.1. PLEASE MAKE YOUR CHECK PAYABLE TO THE "SC PROCUREMENT REVIEW PANEL."

LEGAL REPRESENTATION: In order to prosecute an appeal before the Panel, a business must retain a lawyer. Failure to obtain counsel will result in dismissal of your appeal. *Protest of Lighting Services*, Case No. 2002-10 (Proc. Rev. Panel Nov. 6, 2002) and *Protest of The Kardon Corporation*, Case No. 2002-13 (Proc. Rev. Panel Jan. 31, 2003).



ARMSTRONG FLAG COMPANY

20 PARK STREET
WINCHESTER, MA 01890

March 30, 2009

Chief Procurement Officer
State of South Carolina
Capital Center
1201 Main Street, Suite 600
Columbia, SC 29201

Chief Procurement Officer,

I would like to file a protest regarding Solicitation# 5400000800 – Statewide Term Contract for New Flags. My records show that the price sent in by Allied Materials and Equipment C., Inc. is higher than the price submitted by Armstrong Flag Company.

All procedures and requirements were properly prepared by Armstrong Flag in submitting this bid. I request that you inform me as to why the bid submitted by Armstrong Flag Company was not awarded the above contract.

Best regards,

Trey Armstrong
Armstrong Flag Company



ARMSTRONG FLAG COMPANY
20 PARK STREET * WINCHESTER, MA 01890
1-888-553-5247
www.armstrongflag.com

Procurement Manager's Decision

Armstrong Flag Company's offer could not be fairly evaluated with responsive offers for it failed to meet the following material requirements:

1. Samples were not provided as required;
2. Product literature was not provided as required, and
3. Their offer did not identify the makes and models of the flags being offered.

The combination of all 3 items above results in an undefined offer that simply cannot be evaluated. The State does not know what make and model flags are being offered and so it does not know what to evaluate.

The approach to the procurement was to use an acceptable make and model product as a quality standard and allow vendors to submit offers for that make and model or an equal. The required samples and product literature were to be used by the State to identify what products were being offered and determine their level of quality. This approach is commonly used for straight forward commodity procurements in a market(s) that:

1. has not been tested by the governmental entity for several years, and
2. it is determined to be more efficient to let said market(s) identify current products via offers rather than complete an exhaustive market study prior to issuing the solicitation.

In order for Armstrong's offer to receive further consideration, the State would have to afford Armstrong an opportunity to cure the material defects in their offer after bid opening. Such an action would be prejudicial to other offerors. While Armstrong's pricing has been established for each line item, the actual product is unknown. Therefore, there is the potential for Armstrong to shop or negotiate with suppliers after bids opened (prices plus makes and models have been exposed). While the State has no reason to think that Armstrong would actually exercise this negotiating tactic with suppliers, the fact that the opportunity is present precludes waving the requirements or providing an opportunity to cure.

Richard Brinkley, CPPB



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